No. 13940

United States Court of Appeals

FOR THE NINTH CIRCUIT.

JAMES ROLLAND FRANCY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

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JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Central Division. [4-6][1] The district court made no specific findings of fact. These

[1] **Numbers appearing in brackets herein refer to pages of the printed Transcript of Record filed herein.**

were waived. No reasons were stated by the court in writing for the judgment rendered. The judge for the court below briefly stated orally his reasons for the conviction. [66]

The trial court found appellant guilty. [66] Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charged an offense against the laws of the United States. [3-4] This Court has jurisdiction of this appeal under Rule 37 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [6-7]

STATEMENT OF THE CASE

The indictment charged the appellant with a violation of the Universal Military Training and Service Act. It was alleged that after appellant registered and was classified, he was ordered to report for induction. It is then alleged that on or about July 10, 1952, appellant "knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do." [4]

Appellant pleaded not guilty. He waived the right of trial by jury. Findings of fact and conclusions of law were also waived. [9] Appellant subpoenaed the production of the secret investigative report of the FBI made pursuant to Section 6(j) of the act. The Government produced the report at the trial. The FBI report was admitted into evidence. [50-51] It was used at the trial. [51]

After receiving evidence and hearing testimony, the court considered a motion for a judgment of acquittal made by the appellant. [21-24, 63-65] The motion was denied. [66] The appellant was convicted. [66] He was sentenced to serve a period of four years in the custody of the Attorney General. [4-6] Notice of appeal was timely filed. [6-7] The transcript of the record (including the statement of points relied upon) has been timely filed in this Court.

THE FACTS

James Rolland Francy was born on November 5, 1931. (1)[2] He registered with his local board on May 8, 1950. (2) The local board mailed to him a selective service classification questionnaire on January 4, 1951. (3) Francy filled the form out in a proper manner and filed it with his local board. (5)

He showed his name and address. (6) He did not answer that he was a minister of religion. (7) He showed that he had no employment. (8-9) He showed that he was born in Glendale, California, on November 5, 1931. (10) He signed Series XIV showing that he was a conscientious objector. He requested that the conscientious objector form be mailed to him. (11)

The local board mailed the special form for conscientious objector to him. (12) He did not sign either signature lines under Series 1(A) or Series 1(B). He did, however, make his own separate statement. He said: "I am by reason of my religious training and belief, conscientiously opposed to participation to war in any form and I am further conscientiously opposed to participation in noncombatant training or service in the armed forces. I, therefore, claim exemption from combatant and noncombatant training and service in the armed forces." (13)

In the conscientious objector form Francy showed that he believed in the Supreme Being. He stated that the nature of his belief involved duties superior to any obligations arising from human relations. (14) He stated that he believed in obeying all the laws of the land not in conflict with the law of God. One law of God that he would not violate was the commandment: "Thou shalt not kill." (18) He stated that he followed the law of love rather than the law of killing. He said that he could not fight for any government.

[2] **Numbers appearing in parentheses refer to pages of the draft board file that are written in longhand at the bottom of each page and circled.**

He emphasized that he feared God and trusted in him. He stated that he respected the United States Government as the best government on earth, but because of his being a Christian he had to put God's kingdom first. (14, 18) He showed that the kingdom of God was not of this world, and that he could not support both this world and the government of God. He preferred to support God's kingdom. (19)

In answer to the question as to how he got his belief as a conscientious objector, he showed that he received it from training by his mother and his grandparents. He said that they were Bible students and that they reared him as one of Jehovah's Witnesses. He added that he relied on Mrs. Rose more than any other person for religious guidance. (15) Francy said that he believed in the use of force only when "dealing with individual criminals". (15)

In the conscientious objector form Francy reviewed at length the behavior in his life that demonstrated the consistency and depth of his conviction. First he began with his attendance at school as a little child. He showed that according to his conscientious beliefs he refused to salute the flag of any nation. He offered to stand with respect. He stated that the schoolteacher compelled him to leave the room while the ceremony was in progress. He reviewed the history of his trouble when, as a student in school, he refused to salute the flag. Then he showed in his statement that the teachers allowed him to stand at attention while other students saluted the flag. (20)

He explained at length the reasons why he could not salute the flag. He showed that he respected the flag and the nation for which it stood. However, because of his covenant with Almighty God he could not violate the commandment of God recorded at Exodus 20: 3-5. He showed that it was his conscientious belief that the salute of the flag violated that particular commandment of Almighty God. He then added that he was willing to pledge to the fact that he would be obedient "to all the laws of the United States that are consistent with God's law, as set forth in the Bible." (21)

He answered that he had given public expression to his conscientious objections. He stated that he wrote a paper in high school. In the paper he emphasized the fact that he did not put his trust in any government on earth but that he relied exclusively upon Almighty God for protection. He referred to the fact that he refused to buy defense stamps while attending school during the last war, when he was requested to purchase such stamps. He stated that he told many of his classmates and his friends about his beliefs and conscientious objections.

Francy gave a list of the schools he attended, a list of his employers and a list of his residences, or places where he had lived. (15-16) He named his parents. He showed that they were divorced. He said that he did not know the religion of his father. He showed that his mother's religion was that of Jehovah's Witnesses.

Francy told the draft board in this form that he was a member of a religious organization. He said that he was one of Jehovah's Witnesses. He described the Watchtower Bible and Tract Society of Brooklyn, New York, as being the legal governing body of the group. He pointed out that he had been reared as one of Jehovah's Witnesses. He showed the board that he had been baptized in 1939. He then gave the address of the church in Tujunga, California. He gave the name of Merle G. Carmichael as the presiding minister of the congregation. (16)

Francy described extensively his creed as one of Jehovah's Witnesses. He stated that he was in the army of Christ Jesus. He said that he was authorized to use only the weapons of a soldier of Christ Jesus. He showed that such weapons of warfare were not carnal. He answered that he was not authorized to engage in war or to use any of the implements of warfare used by the nations of this world. He showed that, as a Christian soldier or minister, he could not desert the army of Christ Jesus for any army in the world. He referred back to the description of his belief in Series II

of the special form for conscientious objector, Question 2. (14, 18-21)

Francy listed several persons as references. He signed the conscientious objector form. (17)

The local board gave Francy a classification that made him liable for the performance of noncombatant military service as a conscientious objector in the armed forces. The classification was I-A-O. (12) After notification of this classification, Francy wrote a letter to his local board taking an appeal and requesting a personal appearance. (24) He was notified to appear before the local board, which he did. (12, 25) Upon his personal appearance he requested the local board to give him the full conscientious objector classification, which was then IV-E. This was in lieu of the I-A-O classification. The local board even refused to reclassify him. The local board merely said that his file would be forwarded to the appeal board. In fact, he was warned that he must comply with all of the Selective Service Regulations. (26)

The local board thereafter wrote Francy for the name of his present employer. In this letter the clerk of the local board confirmed the decision of the local board that his file would be sent to the appeal board after his armed forces physical examination. (27) Francy notified the board that he was unemployed. (28)

Francy was given a preinduction physical examination and found to be acceptable. (29, 30-38, 39) The local board sent the file to the board of appeal. (12) The appeal board determined that Francy was not to be classified as a conscientious objector and thus caused the file to be referred to the Department of Justice. This reference was for an appropriate inquiry and hearing. (12, 40)

The file was received by the Department of Justice. (44) The case was investigated by the FBI and a secret report made. After the case was with the department for ten months it was finally completed. (44) The hearing officer received the complete file and the secret investigative re-

port from the department on January 4, 1952. (44) He notified Francy to appear before him on January 18, 1952, for a hearing on his conscientious objections. (44) Francy wrote to the hearing officer and requested notice of the unfavorable evidence before the hearing, which was in accordance with the notice received from the hearing officer. [30] The hearing officer wrote Francy a letter and said that she would give the adverse evidence to him before the hearing proceeded. She promised this on the day of the hearing. [31] At the hearing the hearing officer quoted to Francy from the secret report. [32] The hearing officer gave some of the unfavorable evidence but not all appearing in the report. [42]

An extensive FBI report was made on Francy. After it was completed, it was forwarded to the Department of Justice by the FBI. It was then, in turn, sent to the hearing officer. The hearing officer had possession of the FBI report. She had it before the hearing and used it in making her report on the registrant's conscientious objections, which report was made to the Department of Justice. The hearing officer on January 28, 1952, made a report to the Department of Justice. The report first gave the background of Francy. It stated that he expected to attend the University of California at Berkeley, and that he intended to study to become an engineer. The hearing officer stated that Francy was baptized as one of Jehovah's Witnesses in 1939. She said that he had been active in the preaching work of Jehovah's Witnesses during his teens and that he was a devout Jehovah's Witness. She said that as such he was a conscientious objector to military service of any kind. She pointed out that he was a top-grade student in school. She showed that he lived with his mother and stepfather.

The hearing officer made reference to the FBI report. She said that the report showed that he was reared as one of Jehovah's Witnesses and that he was sincere as a conscientious objector. She said that the report showed that he based his objections on religious belief. The report

showed that he had been one of Jehovah's Witnesses since childhood. The report of the FBI was referred to as showing that he was "not presently active in this church." Here the hearing officer stated that the FBI quoted from the congregation servant, who was reported to have stated that Francy occasionally attended services but that he devoted none of his time to the work. The FBI report was referred to to show that the presiding minister said that Francy did not have any lack of faith but that he had done, of course, little work, due, perhaps, to the uncertainty of his Selective Service status.

The hearing officer concluded that Francy was sincere in his conscientious objections and that his beliefs came from religious training and beliefs. She emphasized that they were not recent. She did, however, recommend that Francy should be placed in Class I-A-O. This classification denied him his full conscientious objector status. It permitted him to make a partial claim as a conscientious objector. He was made liable for military training and service in the armed forces as a noncombatant soldier with conscientious objections only to combatant training and service. (45-46)

The Department of Justice concurred in the recommendation of the hearing officer. The Special Assistant to the Attorney General in turn wrote a letter to the district board of appeal. In his letter he recommended that the report and recommendation of the hearing officer be followed and that Francy be classified in Class I-A-O, making him liable for noncombatant military service. (41, 42)

The appeal board, upon receipt of the Selective Service file and the papers from the Department of Justice, did as was recommended. It classified Francy in Class I-A-O. This made him liable for the performance of noncombatant military service. (41) When the local board received the file back from the appeal board, it notified the appellant of his classification. (12)

Francy, between the time of his local board classification and the classification by the board of appeal, went to work

for the Lite Steel Corporation. That employer wrote a letter concerning Francy to the local board on May 22, 1952 (filed on May 23, 1952). The local board considered the letter and determined that it was insufficient to authorize a deferment. (12, 52)

On the 20th of June, 1952, Francy was ordered to report for induction on July 10, 1952. He acknowledged receipt of the notice. He went to the local board and told the clerk of the board that he could not comply with the order to report for induction. On July 10, 1952, he failed to report for induction as ordered by his local board. (12, 53, 56)

QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed that appellant possessed conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based upon his sincere belief in the Supreme Being. He established that his obligations to the Supreme Being were superior to those owed to the state. He showed that his beliefs were not the result of political, sociological or philosophical views, but were based solely on the Word of God. (12-22) The local board classified Francy in Class I-A-O. This classification made him liable for service in the armed forces as a conscientious objector to combatant military training and service. (12) The local board forwarded the file to district appeal board. The file was referred to the Department of Justice. After a hearing on the conscientious objections of the appellant the hearing officer recommended the I-A-O classification. The Department of Justice concurred in this recommendation by the hearing officer and recommended to the appeal board that Francy be classified I-A-O. (42) The appeal board classified Francy in Class I-A-O, making him liable for noncombatant military service. (41)

It was contended in the motion for judgment of acquittal

that the denial of the conscientious objector status was arbitrary and capricious. [23-24, 64-65] The motion for judgment of acquittal was denied. [66]

The question presented here, therefore, is whether the denial of the claim for classification as a conscientious objector was without basis in fact and whether the recommendation of the Department of Justice and of the hearing officer, as well as the classification by the district appeal board, were without basis in fact, arbitrary and capricious.

II.

The local board classified Francy in Class I-A-O on January 25, 1951. (12) He requested a personal appearance. (24) He was notified to appear on February 8, 1951. (25) Upon the personal appearance no new classification was given. The old classification was not set aside. The local board did not consider the case *de novo*. It regarded the case as closed, as far as the local board was concerned. It notified the registrant that his case would be sent to the appeal board for its determination. (26, 27)

The motion for judgment of acquittal complained of the fact that the local board did not give Francy a *de novo* consideration upon his personal appearance and that it refused to reclassify him anew upon the hearing. [23, 64] The motion for judgment of acquittal was denied. [66] The trial court held that the draft board officials were entirely honest. [66]

The question presented here, therefore, is whether there was a denial of due process of law, contrary to the Selective Service Regulations, upon the personal appearance when the local board failed and refused to reconsider the claim of Francy *de novo* and also to reclassify him entirely anew following his personal appearance.

III.

The secret FBI investigative report was in the hands of the hearing officer at the time of the hearing. [39-40]

Francy made a request to be given a summary of the FBI report before the hearing. [30-33]

During the personal appearance of appellant before the hearing officer she read excerpts to Francy from the FBI report that were considered by her to be adverse and unfavorable. [31-32] Francy had no way to test whether what the hearing officer read to him was a fair and adequate summary. [33-34]

Complaint was made in the motion for judgment of acquittal that the failure to give all the adverse evidence to appellant that appeared in the FBI report denied appellant due process of law. [65]

The question presented, therefore, is whether appellant was denied a full and fair hearing upon the hearing before the hearing officer by not being given a full and adequate summary of the FBI report.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal, duly made at the close of all the evidence.

II.

The district court erred in convicting the appellant and in entering a judgment of guilt against him.

III.

The district court committed reversible error in refusing to hold that there was no basis in fact for the denial of the conscientious objector status, that the clasisfication was arbitrary and capricious and that appellant was denied his procedural rights to due process of law.

SUMMARY OF ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A-O.

Section 6(j) of the act (50 U. S. C. App § 456(j), 65 Stat. 83) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14) provides for the classification of conscientious objectors in Class I-O. This classification carries with it the obligation to do civilian work contributing to the maintenance of the national health, safety, or interest.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war. These objections were to both combatant and noncombatant military service. These were based on his belief in the Supreme Being. His belief charged him with obligations to Almighty God superior to those of the state. The evidence showed that his beliefs were not the result of political, sociological, or philosophical views. He specifically said they were not the result of a personal moral code. The file shows without dispute that the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses. The board of appeal, not-

withstanding the undisputed evidence, held that appellant was not entitled to the conscientious objector status.

The denial of the conscientious objector classification is arbitrary, capricious and without basis in fact.—*United States* v. *Alvies,* 112 F. Supp. 618; *Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.); *United States* v. *Pekarski,* — F. 2d — (2d Cir. Oct. 23, 1953); *Taffs* v. *United States,* — F. 2d. — (8th Cir. Dec. 7, 1953).

POINT TWO

The local board denied appellant procedural due process upon his personal appearance when it failed to consider his case *de novo* and to give him a new classification following the personal appearance as required by Section 1624.2 of the regulations.

Section 1624 of the Selective Service Regulations required a completely *de novo* consideration of the claims of appellant upon his personal appearance. The evidence shows that the board did not do this. It was their intention to send the case to the appeal board for determination. This conclusion was reached before or upon the personal appearance. The regulations were defied by the local board.

The decision of the courts is that failure to conduct a *de novo* hearing upon personal appearance is basis for acquittal. This Court has so held in *Knox* v. *United States,* 200 F. 2d 398.

The trial court should have sustained the motion for judgment of acquittal because there was a denial of due process upon the personal appearance. This was because of the failure of the local board to consider the case of appellant entirely anew upon personal appearance.

POINT THREE

Appellant was denied a full and fair hearing upon his personal appearance before the hearing officer in the Department of Justice when that officer failed and refused to give to appellant a full and fair summary of the secret FBI investigative report on the *bona fides* of appellant's conscientious objector claim.

Section 6(j) of the act (50 U. S. C. App. § 456(j) 65 Stat. 83) provides for the hearing in the Department of Justice. *United States* v. *Nugent,* 346 U. S. 1, specifically held that, while the registrant was not entitled to be given the secret FBI investigative report, it was the duty of the Department of Justice to supply to the registrant a full and fair résumé of the secret report. This was not done by the hearing officer at the hearing in the Department of Justice.

Francy had written to the hearing officer before the hearing and requested the adverse information in the FBI report. Francy did not ask for the summary of the FBI report at the hearing, since it was unnecessary for him to do so. The Department of Justice has amended its regulations and now requires that a full and complete summary of the entire FBI report be given to the registrant at the hearing, regardless of whether he requests it or not. This amendment of the regulations of the department and the change in practice is a confession of the department that before the *Nugent* decision it was unnecessary for the registrant to request a summary.

Even if the Court should conclude that it is necessary for a registrant to request a summary of the FBI report at the hearing, appellant is nevertheless in position to claim that in this case it be produced. Nevertheless, in this case the appellant is in position to complain of the failure to make a full and fair résumé of the FBI report.

The hearing officer gave appellant two or three small bits of evidence. Her making a partial summary waived the requirement that Francy request the adverse evidence. Since

she undertook to make a summary of the FBI report it was her responsibility to make a full report.

POINT FOUR

The nature of the defenses shows that the appellant was denied procedural due process and that the draft board exceeded its jurisdiction. This makes inapplicable the rule of *Falbo* v. *United States*, 320 U. S. 549, cutting off defenses of illegal classification because of failure to exhaust remedies.

That Francy did not report for induction does not make the doctrine of *Falbo* v. *United States,* 320 U. S. 549, applicable. The holding in that case is confined to challenges to the classification. The decision does not reach defenses based on the violation of the act and regulations that deprive the registrant of procedural due process of law.

When defenses are raised (as here) that there is a violation of the procedural rights of the registrant, the courts have uniformly held that the doctrine of *Falbo* v. *United States,* 320 U. S. 549, does not apply. The illegal reopening of a classification in violation of the regulations, the denial of rights on personal appearance or the refusal of rights of appeal are all defenses that can be raised in response to an indictment charging (as here) a failure to report for induction. *United States* v. *Peterson,* 53 F. Supp. 760 (N. D. Cal. S. D.); *United States* v. *Laier,* 52 F. Supp. 392 (N. D. Cal. S. D.); *Tung* v. *United States,* 142 F. 2d 919, 921-922 (1st Cir.); *United States* v. *Ryals,* 56 F. Supp. 773, 775 (N. D. Ga. N. D.); *United States* v. *Walden,* 56 F. Supp. 777-778 (N. D. Ga. N. D.). Compare *Baxley* v. *United States,* 134 F. 2d 610, and *Wells* v. *United States,* 158 F. 2d 932, 933 (5th Cir.), the latter being directly in point on the right to consider the procedural questions raised in this case.

Appellant contends that the failure to give a full and fair summary of the FBI report to him by the hearing officer is a procedural due process violation. He also says that

the refusal of the local board to consider his claim for classification entirely anew upon personal appearance was a violation of procedural due process.

The first point presented above also should be considered by this Court. The case was tried in the district court on the proper theory that under present law the appellant had a right to make a challenge to the classification in defense to the indictment. See *Dodez* v. *United States,* 329 U. S. 338. Also the Government, by failing to object to the making of the defense, waived its right to insist that no defense can be made. Now appellant had exhausted his remedies when he had the final type preinduction physical examination. (*Dodez* v. *United States,* 329 U. S. 338) The present act, unlike the 1940 act, does not contemplate cutting off defenses in response to indictments charging a failure to report for induction, even where there is no preinduction physical examination. See Ex parte *Fabiani,* 105 F. Supp. 139 (E. D. Pa.).

Therefore this Court can consider each and all of the points above raised in response to the indictment.

ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A-O.

Section 6(j) of Title I of the Universal Military Training and Service Act of 1951 (50 U. S. C. § 456(j)), provides, in part, as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code."

Section 1622.14 (a) of the Selective Service Regulations (32 C. F. R. § 1622.14 (a)) provides:

> "In Class I-O shall be placed every registrant who would have been Classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

The documentary evidence submitted by the appellant establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service which were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

There is not one iota of documentary evidence that in any way disputes the appellant's proof submitted showing that he was a conscientious objector. The statement of facts made by the hearing officer of the Department of Justice and the summary of the FBI investigative report do not contradict but altogether corroborate the statements made by the appellant in his conscientious objector form.

The Department of Justice makes an extensive ex parte investigation of the claims for classification as a conscientious objector when first denied by the appeal board, pursuant to 50 U. S. C. App. § 456(j). If there were any adverse evidence, certainly agents of the FBI in their deep and scrutinous investigation would have turned it up

and produced it to the hearing officer to be used against the appellant. The summary supported the appellant's claim.

There is no question whatever on the veracity of the appellant. The Department of Justice and the hearing officer accepted his testimony. The appeal board did not raise any question as to his veracity. It merely misinterpreted the evidence. The question is not one of fact, but is one of law. The law and the facts irrefutably establish that appellant is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

A decision directly in point supporting the proposition made in this case, that the I-A-O classification (conscientious objector willing to perform noncombatant military service) and the determination of the appeal board denying the I-O classification (full conscientious objector) are arbitrary and capricious is *United States* v. *Relyea,* No. 20543, United States District Court for the Northern District of Ohio, Eastern Division, decided May 18, 1952. In that case the district court sustained the motion for judgment of acquittal saying, among other things, as follows:

> "I think it would have been more difficult for the court to find the act of the Board was without any basis in fact if the Board had classified this man as I-A rather than I-A-O. They accepted the defendant's profession of sincere and conscientious objections on the religious grounds as being truthful, but they attempted, and in my opinion

> without any basis in fact, to assert that while he was sincere and conscientious, that sincerity and conscientiousness extended only to his active aggressive participation in military service and that he was not sincere in his statements that he was opposed to war in all its forms."

This was an oral opinion which is unreported. A printed copy of the stenographer's transcript of the decision rendered by Judge McNamee will be handed up at the oral argument.

A similar holding was made by United States District Judge Murray in *United States* v. *Goddard,* No. 3616, District of Montana, Butte Division, June 26, 1952. The court, among other things, said:

> " . . . after due consideration, the Court finds that the evidence is insufficient to sustain a conviction for the reason that there is no basis in fact disclosed by the Selective Service file of defendant upon which Local Board No. 1 of Ravalli County, Montana, could have classified said defendant in Class I-A-O, and therefore the said Board was without jurisdiction to make such classification of defendant and to order defendant to report for induction under such classification."

The above decision was a part of a judgment. No opinion was written. A printed copy of the judgment accompanies this brief.

This case is distinguished from the facts in *Head* v. *United States,* 199 F. 2d 337 (10th Cir.), where the I-A-O classification was held to be proper. In that case the facts showed that the registrant was a member of a church that believed it was right to perform noncombatant military service and that the I-A-O classification was satisfactory. Also facts were present in the *Head* case that impeached the good faith conscientious objections of the registrant. Here the undisputed evidence showed that the religious

group that Francy belonged to were opposed to both combatant and noncombatant military service and that the I-A-O classification was not satisfactory. Francy was not impeached in his good faith.

There is absolutely no evidence whatever in the draft board file that appellant was willing to do noncombatant military service. All of his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. The appeal board, without any justification whatever, held that he was a conscientious objector who was willing to perform noncombatant military service. Never, at any time, did the appellant suggest or even imply that he was willing to do noncombatant military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of the military machinery.

The appeal board makes no explanation whatever of its reasons for rejecting the claim that appellant be placed in Class I-O as a conscientious objector to participation in both combatant and noncombatant military service. Certainly if there were anything in the file to indicate that appellant was willing to do noncombatant military service, the hearing officer and the Department of Justice would have found it and relied upon it.

The appeal board, without any grounds whatever, compromised appellant's claim for total conscientious objection and awarded him only partial conscientious objector status. This was directly contradictory to the testimony that appellant had given to the local board after the case was returned to the local board by the appeal board for further investigation. Appellant explicitly stated in his papers, as well as upon the special examination by the local board for the appeal board, that he would not even perform civilian work and that he objected to going into the army. He even stated that he would not serve as a chaplain in the armed forces.

It was arbitrary for the appeal board to grant only part of appellant's claim and his testimony and reject the balance. The board of appeal classified appellant as one who was willing to serve in the armed forces and perform noncombatant service. This finding flies directly in the teeth of the evidence and the sworn written statements submitted by the appellant.

The appeal board should have accepted the appellant's claim for exemption as a total conscientious objector or rejected completely his claim to be a conscientious objector. The appeal board had no authority to compromise his claim. Either he was telling the truth and was entitled to a I-O classification or else he was telling a lie and deserved a I-A classification. If the appeal board demurred to his evidence and the report of the hearing officer, it accepted the facts and made a determination that was without any basis in fact, arbitrary and capricious.

In this case the undisputed file showed that the appellant believed in the Supreme Being, that his religious duties were higher than those owed to the state, that he opposed participation in war because of them and that they were not the result of political, sociological or philosophical training but were religious beliefs. This brought the appellant clearly within the definition of a conscientious objector appearing in the act and the regulations.

There are many other grounds why the denial of the conscientious objector status is arbitrary, capricious and without basis in fact. These are argued extensively under Question One in the brief for appellant filed in *White* v. *United States,* No. 13,893, the companion case to this one, at pages 10-11, 14-33. Reference is here made to that argument as though copied at length herein. It is proper to make this reference because the two cases are heard here consecutively. They were tried by the same judge. They were tried consecutively. They appealed together. It is proper, therefore, to consider here the argument made in that case since the facts are identical to the facts in this case.

The position of the appellant on this point is eloquently argued by the opinion in *United States* v. *Alvies,* 112 F. Supp. 618 (N. D. Cal. May 28, 1953). Reference is made to the entire opinion. See also *United States* v. *Pekarski,* — F. 2d — (2d Cir. October 23, 1953); *Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.); *United States* v. *Konides,* Criminal No. 6216, United States District Court, District of New Hampshire, March 12, 1952; *United States* v. *Konides,* Criminal No. 6264, United States District Court, District of New Hampshire, June 23, 1953, Honorable Peter Woodbury, Circuit Judge, sitting as district judge by special designation. Copies of these unreported decisions accompany this brief. — See also *Taffs* v. *United States,* — F. 2d — (8th Cir. Dec. 7, 1953).

It is respectfully submitted that the denial of the conscientious objector claim is without basis in fact, arbitrary and capricious.

POINT TWO

The local board denied appellant procedural due process upon his personal appearance when it failed to consider his case *de novo* and to give him a new classification following the personal appearance as required by Section 1624.2 of the regulations.

The local board is charged with knowledge of the regulations regarding personal appearance including sections 1624.1(a), 1624.2 and 1624.3. Ignorance of the requirements of the regulations is no excuse. The requirements of the above regulations are mandatory. The purpose of the personal appearance before the local board is to protect the registrant's rights. The procedure to be followed by the local board upon a personal appearance is mandatory. The violation of the procedural requirements vitiates the classification and makes void the order to report for induction regardless of the subsequent classification by the appeal

board. Part 1624 of the regulations, providing for the personal appearance and procedure to be followed by the local board after personal appearances, must be complied with in order to guarantee the rights of the registrant.

The right to a *de novo* consideration of the classification is an important one. The appellant was entitled to be heard entirely anew as though he had never before been classified. The *de novo* consideration of the case by the local board upon personal appearance is essential to insure justice and due process of law.

The promulgators of the regulations fixing the procedure to be followed by the local board after a personal appearance intended that the rights of the registrant before the appeal board as well as before the local board be preserved. Those duties of the local board do not hinge upon whether "new information" was received by the local board.—*United States* v. *Zieber,* 161 F. 2d 90 (3rd Cir. 1947); *United States* v. *Stiles,* 169 F. 2d 455 (3rd Cir. 1948); *Knox* v. *United States,* 200 F. 2d 398 (9th Cir. 1952).

It may be argued by the Government that because no oral or written notice of classification was given in the *Stiles* (169 F. 2d 455 (3rd Cir. 1948)) and *Knox* (200 F. 2d 398 (9th Cir. 1952)) cases the situation is distinguishable. The fact that actual notice of no change of classification was given to Francy by letter does not in any way make harmless the failure to give the appellant a *de novo* hearing and a new classification upon personal appearance.

The facts in this case are identical to the facts in *United States* v. *Graham,* 108 F. Supp. 794 (N. D. N. Y. 1952). Judge Brennan there stated, among other things:

> " . . . Regulation 1624.2, subdivision (b), provides that the registrant may discuss his classification, may present further information, and may direct attention to information in his file which he believes the local board has overlooked. Subdivisions (c) and (d) define the duties of the Board after the registrant has appeared before it, and

by their terms require that the local board '—shall again classify the registrant in the same manner as if he had never before been classified', and shall thereafter mail to the registrant a notice of such classification.

" . . . An examination of the file in each case indicates a notation dated '2/28/51' on the back of each questionnaire to the effect that there was no change in classification. On the inside of the outside cover of each file there is the notation '2/28/51 appd. Before bd. No change in classification.' . . .

" . . . A memo dated February 28, 1951, signed by the acting chairman of the Board, is found in each file and is quoted in part below: 'Registrant presented no new evidence at this hearing and was advised by the board that his classification would remain Class I-A in accordance with the unanimous vote of all board members present.' . . .

"An appealing argument is made that the continuation of each defendant in the classification given them prior to February 28, 1951, did not affect his fundamental rights and did not violate the spirit of the Selective Service Regulations. It is urged that this is especially true, since each registrant was afforded the right to appeal and had full opportunity to present additional evidence, and that there is no showing that defendants have been either collectively or separately prejudiced.

"Judicial precedent, however, seems to indicate otherwise. As early as 1943, in the case of *United States* v. *Laier,* 52 F. Supp. 392, it was held that the denial of a personal hearing provided for by the Regulations was a denial of due process, and, since the presentation of additional evidence is but one of the rights afforded on such

hearing, the argument was rejected that subsequent appeals cure such an error. (See *United States* v. *Romano,* 103 F. Supp. 597.) A personal appearance before the Board and a hearing wherein the position is taken by the Board that the classification could not be reconsidered is, in effect, no hearing at all. It is at least a hearing without hope or relief. The absence of additional evidence or new information did not relieve the Board from the requirement that each registrant be classified anew. (*United States* v. *Stiles,* 169 F. 2d 455) . . .

"In the recent case of Ex parte *Fabiani,* 105 F. Supp. 139, there is discussed the increasing willingness of courts to scrutinize the action of local boards, and the cases cited above, together with *United States* v. *Strebel,* 103 F. Supp. 628, are indicative of the fact that the regulations must be strictly construed in favor of the registrant.

"It is conceded that the board did not mail to any of the defendants the notice of classification, as provided in Regulation 1624.2(d). This omission in itself, however, does not destroy the validity of the order of induction. (*Martin* v. *United States, supra* [190 F. 2d 755]); it being conceded that each defendant had actual notice on February 28, 1951, that his classification was unchanged.

"A full and fair disposition of the defendants' contention at every level of the Selective Service System is the measure of their rights. (*United States* v. *Romano, supra*) Unsubstantial deviations from procedural methods, as found in *Martin* v. *United States, supra,* and *United States* v. *Fry,* District Court for the Southern District of New York, March 6, 1952, [103 F. Supp. 905] do not void the order of induction. The right of each registrant to a new classification after a personal

> hearing is, however, a substantial right which the board is bound to afford him at that particular level of the Selective Service System."

The facts in this case cannot be distinguished from the facts in *United States* v. *Graham,* 108 F. Supp. 794 (N. D. N. Y. 1952).

This Court should apply here the rule of *United States* v. *Stiles,* 169 F. 2d 455 (3rd Cir.). In that case the appellant, one of Jehovah's Witnesses, was treated in the same way as was the appellant here. The facts are the same in every respect with the facts in this case. The Court said:

> "We think that the purpose of the regulation in this regard is to require the local board to consider anew each registrant's classification who appears personally before it and to notify him of its action upon its classification so that he may know definitely the result of his discussion with the board, which, of course, could result in a change of his classification even though he may have furnished no new information to the board. Moreover, § 625.2(e) gives such a registrant the same right of appeal from such new classification as in the case of an original classification."

The attention of the Court is called to the fact that the regulations are identical under the 1940 Act and the 1948 Act. Section 1624.3 postpones induction under the 1948 Act as did Section 625.3 under the 1940 Act. Until there is a mailing of a new notice of classification following the personal appearance the regulations specifically postpone induction until that act is performed. Since that was not done, there is no jurisdiction to issue the order to report regardless of actual notice on the part of the registrant of a violation of the regulations. Actual notice by the district judge and the Judges of this Court of an oral notice of appeal in no way would confer jurisdiction where there had been no written notice of appeal filed within the time and manner

required by the law in a case taken from the district court to this Court.

Martin v. *United States,* 190 F. 2d 775 (4th Cir. 1951), is not controlling here. In that case there was a *de novo* consideration. There was a new classification made. The only default by the local board was its failure to mail a classification card following the *de novo* classification. The court held that to be harmless error in view of the fact that Martin had received actual notice of the classification upon the occasion of his personal appearance and also because the clerk of the board read to him a written memorandum of the classification when he came to the local board following the classification made after personal appearance. The *Martin* case is not in point; *Stiles, supra,* is directly in point.

Atkins v. *United States,* 204 F. 2d 269 (10th Cir. 1953), does not apply. The distinction between the *Atkins* case and the case at bar is that in the *Atkins* case there was an actual reopening of the classification upon the personal appearance. In this case there was not any reopening. In the *Atkins* case the clerk testified that there was a reopening. The memorandum made upon the occasion of the personal appearance also showed that there was a *de novo* consideration.

In the case at bar the memorandum as well as the testimony shows conclusively that there was no *de novo* consideration of the claim for classification when the local board conducted the personal appearance. The memorandum to the contrary shows definitely that the case was not reopened. It is plain, therefore, that there was no *de novo* consideration of the claim for classification upon the occasion of the personal appearance as required by Section 1624.2(c) of the regulations.

Even appellant's appeal still does not cure the error. The complaint here made is that the local board did not reclassify the registrant upon the personal appearance. There was no *de novo* consideration of the case and no new classification as required by the regulations. The improper conduct of the local board upon personal appearance cannot be

corrected by a new classification on appeal.—*United States* v. *Laier,* 52 F. Supp. 392 (N. D. Cal. S. D. 1943); *United States* v. *Zieber,* 161 F. 2d 90 (3rd Cir. 1947).

The most important board to the registrant is his local board. The men that make up such a board can be seen. They can observe the registrant. They can see the sincerity of the registrant. They perform to the registrant the same function as the trial judge performs to the litigant. The function on a personal appearance is much like a new trial following the granting of a new trial by a trial judge. The making of a proper request in writing under the regulations produces as a matter of course under the law a new trial before the board. The new trial or *de novo* function cannot be nullified successfully by saying that the judgment will remain the same. It is the duty of the tribunal to actually conduct a *de novo* trial. When it is not done the law is violated. Such is the case here according to the admitted facts.

It is respectfully submitted that the violation of the regulations by the local board in failing to consider *de novo* the classification of appellant upon his personal appearance and the failure to mail to him a new notice of classification vitiated the order to report. The omission on the part of the local board constitutes ground for a judgment of acquittal.

POINT THREE

Appellant was denied a full and fair hearing upon his personal appearance before the hearing officer in the Department of Justice when that officer failed and refused to give to appellant a full and fair summary of the secret FBI investigative report on the *bona fides* of appellant's conscientious objector claim.

The undisputed evidence in this case shows the appellant wrote the hearing officer in advance of the hearing and re-

quested the adverse evidence. Her reply was that she would give it at the hearing.

When Francy appeared at the hearing the hearing officer gave him one or two small pieces of the adverse evidence. He requested a summary or notification of all the adverse evidence from the FBI reports that she had in her hand.

Therefore there is present in this case no question about the fact that the appellant actually requested upon two occasions that he be supplied with the unfavorable evidence appearing in the secret investigative report.

The report of the hearing officer to the Department of Justice was adverse. Just to what extent she relied on the extensive adverse evidence appearing in the FBI report is not clear. It does appear, however, that there was more adverse evidence in the report than she gave to Francy at the hearing. Under these circumstances it is clear, therefore, that she failed to give Francy a full and fair résumé of the adverse evidence appearing in the report. The principle announced by the Supreme Court in *United States* v. *Nugent,* 346 U. S. 1, was not complied with. The contention here that the defendant was denied a full and fair hearing upon the appearance before the hearing officer is supported by the new regulations of the Department of Justice. These new regulations require that the registrant be supplied with a full and complete summary of the entire FBI report. It was at least the duty of the hearing officer to supply a summary of all the adverse evidence.—*United States* v. *Bouziden,* 108 F. Supp. 395 (W. D. Okla.).

The facts in this point are substantially the same as the facts in the case of *Tomlinson* v. *United States,* No. 13,892, on the docket of this Court. The only difference is that Francy made a written request for the adverse evidence. The hearing officer refused the request and did not adequately comply with the request. The similarity of this case to the case of Tomlinson permits appellant to refer here to the arguments made in the brief for appellant filed in that case. Reference is here made to the brief for appellant filed

in the case of *Tomlinson* v. *United States,* No. 13,892, at pages 30 to 40. The arguments there made are adopted here as though copied at length herein. The Court is here requested to consider those arguments as the basis for Point Three above.

It is respectfully submitted that the procedural rights of the appellant were violated upon the occasion of the hearing in the Department of Justice. The hearing officer failed to give Francy a full and fair summary of the adverse evidence appearing in the secret investigative report of the FBI. The trial court should have found that the hearing officer failed to give a full and fair summary of the adverse evidence appearing in the FBI report to Francy. The motion for judgment of acquittal contained this ground in it as a basis for the motion. The motion should have been granted. The trial court committed error. Therefore this Court should hold that the proceedings in the Department of Justice were destroyed by the failure of the hearing officer to give to appellant a full and fair summary of the FBI report.

The record in this case shows that Francy did voluntarily request the hearing officer to supply any adverse evidence. The undisputed evidence shows, however, that the hearing officer undertook to make a small résumé of the adverse evidence appearing in the report. He did not waive the right to have the full and fair résumé.

Appellant did ask for the FBI report. It is true that he did not use the word "résumé" or the word "summary." He asked that he be supplied the unfavorable or adverse evidence or be given the general nature of it. He wanted to know all the evidence that was unfavorable against him. The fact that he may not have used the word "résumé" or "summary" was not enough to defeat his rights to be confronted with the unfavorable evidence. He asked for all the regulations and the Department of Justice would allow at the time.

The Government may place stress upon the fact that the

appellant in this case did not request that he be supplied a summary of the FBI report. To begin with, the Department of Justice procedure forbade the production of any such summary. There was no provision in the Department of Justice regulations for giving a summary. The procedure providing the summary of the FBI report was not established by the Government until on or about September 1, 1953. This was the first time there ever was any procedure authorizing a registrant to get a summary of the FBI report. Since it was impossible for the registrant to obtain a summary of the FBI report from the hearing officer and, inasmuch as the Department of Justice regulations prohibited the giving of such summary at the time this case was heard by the hearing officer, the argument of the Government (that the appellant failed to request a summary) should be rejected.

It should be remembered that the Supreme Court held in the *Nugent* case that the registrant was entitled to a summary of the FBI report. The notice sent out to registrants stated they could get the general nature of the unfavorable evidence. Since the notice did not give them the right to have a summary of the evidence (which the *Nugent* case held they were entitled to), failure to comply with the notice sent was not a waiver of the right to insist on the subpoena duces tecum in the court below.

Regardless of whether the request was made (for the summary of the unfavorable evidence) it is still the duty of the hearing officer to give the registrant a summary on his own motion. That is positively required now by the regulations of the Department of Justice. The recent amendment to the regulations (requiring a summary of the FBI report to be made for the registrant) is a concession by the Department of Justice that the procedure which it followed before the *Nugent* decision and in this case does not meet the requirement of due process of law and Section 6(j) of the act.

In *United States* v. *Bouziden,* 108 F. Supp. 395 (D. C.

W. D. Oklahoma November 13, 1952), it was held that the registrant was entitled to have a summary of the FBI report produced at the hearing. The court held, however, that the failure of the hearing officer to call the registrant's attention to the substance of the adverse evidence constituted a deprivation of the rights of the registrant. It was said:

> "As directed by the statute the Department of Justice made an appropriate inquiry. Then the hearing was held with the registrant for the purpose of determining the character and good faith of the objections of the registrant to his classification. The undisputed evidence is that no mention was ever made by the hearing officer of the unfavorable information contained in the Federal Bureau of Investigation report. No opportunity was given to rebut this unfavorable information. . . .
>
> " . . . The hearing officer must not be permitted to withhold unfavorable information gained during the inquiry, and giving no opportunity to rebut at the hearing, *then use this same unfavorable information as a basis for his adverse advisory recommendation.* If this is done the hearing itself becomes a sham and a farce. Why hold a hearing to determine a fact if there is a predetermination of the fact and no intent to discuss the basis of the predetermination?"

The court in *United States* v. *Bouziden,* 108 F. Supp. 395 (W. D. Okla. 1952), distinguished the decision in *Imboden* v. *United States,* 194 F. 2d 508 (6th Cir.), certiorari denied 343 U. S. 957, on the ground that the hearing officer provided the registrant in that case with the substance of the unfavorable evidence and that no complaint was made about the failure to answer but that the contention was made that he did not give the names of the informants to the registrant.—Compare *United States* v. *Annett,* 108 F. Supp.

400 (W. D. Okla. 1952); reversed on other grounds, 205 F. 2d 689 (10th Cir.) June 26, 1953.

In *Eagles* v. *Samuels,* 329 U. S. 304, the Supreme Court approved the use of the theological panel. The panel made a report that was made a part of the file. It was available to the registrant. It was not withheld to the injury of the registrant as here. The Court, speaking through Mr. Justice Douglas, held that even the information that was received by the special panel and given to the local board, in order to afford due process, had to "be put in writing in the file so that the registrant may examine it, explain or correct it, or deny it. There is, moreover, no confidential information that can be kept from the registrant under the regulations."—(329 U. S., at p. 313). See also *Degraw* v. *Toon,* 151 F. 2d 778 (2d Cir.); *Levy* v. *Cain,* 149 F. 2d 338 (2d Cir); *United States* v. *Balogh,* 157 F. 2d 939 (2d Cir.); judgment vacated, 329 U. S. 692; affirmed on other grounds, 160 F. 2d 999.

This Court has long ago held that a person appearing before an administrative agency is entitled to be informed of any adverse evidence that may be used against him. *Chen Hoy Quong* v. *White,* 249 F. 869 (9th Cir. 1918), is one of the first cases decided by this Court on this point. In that case the Court held that the failure to disclose a secret and confidential communication relied on by an immigration hearing officer violated the procedural rights to due process of law. This Court set aside an order denying an alien admission to the United States on the grounds that he was not given a full and fair hearing.—See also *Bachus* v. *Owe Sam Goon,* 235 F. 847, 853; *Chin Ah Yoke* v. *White,* 244 F. 940, 942; *Mita* v. *Bonham,* 25 F. 2d 11, 12 (9th Cir.); *Ohara* v. *Berkshire,* 76 F. 2d 204, 207 (9th Cir.).

Even where the facts are actually known to the hearing officer (which is not the case here) the administrator cannot base his decision or recommendation upon it.—*Baltimore & Ohio R. Co.* v. *United States,* 264 U. S. 258 (permitting a railroad to acquire terminal roads); *Southern R. Co.* v. *Vir-*

ginia, 290 U. S. 190, 198; *Market St. Ry.* v. *R. Comm'n of California,* 324 U. S. 548, 562.

In *Degraw* v. *Toon,* 151 F. 2d 778 (2d Cir.), a draft board order was held to violate due process. The board considered evidence that damaged the registrant. It was a letter from two members of the advisory board. The court held that the opportunity to know and rebut damaging evidence goes to the heart of the controversy.—See also *United States* v. *Kowal,* 45 F. Supp. 301 (D. Del.).

It is unnecessary for the administrative agency to accord a judicial trial as a part of due process. (*United States* v. *Ju Toy,* 198 U. S. 253, 263) It is necessary that the procedural steps be otherwise in accordance with the requirements of the Fifth Amendment guaranteeing notice and the right to defend or answer a charge. (*Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company,* 227 U. S. 88, 91-92) The Supreme Court has held that where a statute provides for an administrative hearing the due-process clause of the Fifth Amendment requires a full and fair hearing in the sense of the traditional hearing.—*Shields* v. *Utah Idaho Central R. Co.,* 305 U. S. 177, 182.

It has been held that procedural due process requires that where the facts contained in a secret report are relied on by the administrative agency it must be produced and made available at the trial.

> "If that were not so a complainant would be helpless for the inference would always be possible that the court and the Commission had drawn upon undisclosed sources of information unavailable to others. A hearing is not judicial, at least in any adequate sense, unless the evidence can be known."—Mr. Justice Cardozo in *West Ohio Gas Co.* v. *Public Utilities Comm'n,* 294 U. S. 63, 68, 69.

Another important case on this subject is *Morgan* v. *United States,* 304 U. S. 1. That case presented a question

on the validity of an order of the Secretary of Agriculture. He fixed maximum rates charged by market agencies under the Packers and Stockyards Act. (7 U. S. C. §§ 181-229) The Court held that a fair hearing commanded an "opportunity to know the claims of the opposing party and to meet them." Chief Justice Hughes added that the party was entitled to be "fairly advised" and "to be heard" upon the issues. He said that administrative agencies must guarantee "basic concepts of fair play."—304 U. S., at pages 18, 22. See also *Lloyd Sabaudo Societa Anonima* v. *Elting,* 287 U. S. 329, 335-336.

In *Kwock Jan Fat* v. *White,* 253 U. S. 454, it was held that the suppression or omission of evidence did not allow a fair hearing. It was pointed out that everything relied upon in the administrative determination must be included in the record.—253 U. S., at 464.

In *United States* v. *Abilene & S. Ry. Co.,* 365 U. S. 274, 290, it was held that a party before an administrative agency must be apprised of all evidence submitted and made a part of the determination.—See also *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.,* 227 U. S. 88, 93.

The act and regulations make the recommendations of the Department of Justice to the appeal board merely advisory. They may be rejected by the appeal board. The appeal board may classify a registrant as liable for training and service in the armed forces when the Department of Justice recommends that he be classified as a conscientious objector, or vice versa. The Government argues that, because of this advisory nature of the recommendation, the Department of Justice can successfully refuse to give the registrant due process of law. The Government argues that it is not bound to place all the evidence in the file, as the draft board is required to do, purely because the report is advisory in nature.

It is true that the investigation and recommendation of the Department of Justice are merely advisory. This does

not make the use of the illegal FBI report and the nondisclosure of the names of the informants harmless error. The report was relied on. Were it not for the adverse testimony of anonymous witnesses the claim for conscientious objector classification would not have been denied.

It cannot be said that it is harmless error when the rights of the registrant here were denied by the use of the FBI report by the hearing officer and the appeal board.

The FBI report was embraced, accepted and adopted by the appeal board. The unconstitutional procedure of the Department of Justice was adopted as the unconstitutional procedure of the Selective Service System. The appeal board made the invalid proceedings its own. Since the order to report is based on proceedings had before the Department of Justice, the use of the report by the draft boards vitiated the entire proceedings.

It is harmless if the report of the department is against the registrant and the appeal board grants the conscientious objector status. But when the appeal board accepts the recommendation to deny the status claimed by the registrant an entirely different situation is presented. The hearing officer has and relies on the report of the FBI. The Attorney General, making the recommendation to the appeal board, relies on the report of the hearing officer, which is based on the FBI report. In making the recommendation the Attorney General also has before him the FBI report. He tests the report of the hearing officer with it. His recommendation is based not only on the report of the hearing officer, but also on the FBI secret police report. The board of appeal, in more than ninety cases out of a hundred, relies on the recommendation of the Department of Justice, especially when the recommendation is adverse. In this case the board of appeal accepted

and adopted the recommendation of the Department of Justice, based mainly on the FBI report.

It is, then, only proper, necessary, fair, constitutional and in compliance with due process of law that the summary of the adverse evidence gathered and recorded by the Federal Bureau of Investigation be given to appellant. It was relied on by the hearing officer. The hearing officer's report was relied on by the Department of Justice in making its recommendation to the appeal board and the appeal board relied on the recommendation supported by the FBI report. By all principles of fairness this evidence ought to be made available to the registrant on his trial. Without being provided the summary of the FBI report the registrant is denied the right to show that there is no basis in fact for the determination made by the appeal board based on the recommendations made by the Department of Justice and the hearing officer on the conscientious objector claim of the registrant.—*Estep* v. *United States,* 327 U. S. 114; *Kwock Jan Fat* v. *White,* 253 U. S. 454.

The error and harm produced by not giving a summary of the FBI report can be demonstrated by an analogy. There are certain types of judicial proceedings where the jury verdict is merely advisory. If misconduct of counsel, the jury or the court in violation of constitutional rights occurs in a trial where the verdict is merely advisory, it certainly would be ground for a new trial and reversal on appeal if the unconstitutional proceedings before the jury resulted in the verdict that was accepted by the trial court. This is what happened here. The adverse verdict against the registrant was accepted by the appeal board. The unconstitutional trial before the hearing officer invalidated the proceedings before the appeal board when the Department of Justice recommendation, adopting the hearing officer's report, was followed by the appeal board.

Suppose an attorney, during a trial before a jury in a case where the verdict was advisory, handed to the jury an exhibit that had been excluded from evidence. Also

assume that the adversary did not learn of this until after entry of judgment. Putting aside the liability of the attorney for contempt of court, would it be doubted that the verdict and judgment would be set aside even if the verdict were advisory? The same situation exists here.

A chain is no stronger than its weakest link. The recommendation of the Department of Justice and its acceptance by the appeal board becomes a link in the chain. Since it is one of the links of the chain, its strength must be tested. (*United States* v. *Romano,* 103 F. Supp. 597 (S. D. N. Y. 1952)) The absence of the summary of the FBI report from the record and the withholding of it from the registrant at the hearing produces a break in the link and makes the entire selective service chain useless, void and of no force and effect. The Supreme Court held in *Kessler* v. *Strecker,* 307 U. S. 22, that if one of the elements is lacking, the "proceeding is void and must be set aside." (307 U. S., at page 34) The acceptance of the recommendation of the Department of Justice that has been made up without producing the FBI report to the registrant in the proper time and manner makes the proceedings illegal, notwithstanding the fact that the recommendation is only advisory. The embracing of the report and recommendation by the appeal board jaundiced and killed the validity of the proceedings.

This view of the reliance upon the recommendation of the Department of Justice making the report of the hearing officer and the recommendation a vital link in the administrative chain is supported by *United States* v. *Everngam,* 102 F. Supp. 128 (D. W. Va. 1951). In that case the court said:

> "Under these statutory provisions, the hearing, report, and recommendation of the Department of Justice is an important and integral part of the conscription process for the protection of both the government and the registrant. The de-

fendant had the right to have a fair hearing and a non-arbitrary report and recommendation by the Department of Justice to the appeal board.

"It does not appear that any member of the appeal board felt himself bound by this report and recommendation or how far, if at all, it influenced the decision of the appeal board, but that is not enough. The report and recommendation was transmitted to the appeal board to use as an advisory opinion, and was considered and used (as the regulations require) by the appeal board in its subsequent classification of the defendant."

This quotation was made and approved in *United States* v. *Bouziden,* 108 F. Supp. 395 (W. D. Okla. 1952). It is respectfully submitted that the fact that the act and regulations make the recommendation advisory does not prevent the broken link from ruining the required continuously legal chain.

The making of the report and recommendation by the Department of Justice to the appeal board is after the hearing in the Department of Justice which the registrant attends. Appellant had no opportunity to see the report and recommendation of the Department of Justice until after his conscientious objector claim had been denied by the appeal board. The report and recommendation is sent directly to the appeal board. The registrant never sees this report before the appeal board determination. He has no opportunity to answer the report before the final determination by the appeal board. The making of the report and recommendation to the appeal board, wherein reference is made to the FBI report, does not make the report as available to the registrant as to the appeal board. The appellant was entitled to have this notice sent to him before the final determination by the appeal board. It is therefore erroneous for the Government to argue that the adverse evidence in the FBI report was made available to the appellant. It was

not made available until it was entirely too late for him to do anything about the appeal board determination.

The appellant had the right to see his file after the appeal board finished with and returned its denial of his conscientious objector claims. But this was entirely too late because there was no chance for the appellant to get the appeal board to reconsider his classification.

A speculative argument is made by the Government. It is said that the appeal board acted only on the adverse evidence of the FBI report which is referred to in the report and recommendation of the Department of Justice. The report and recommendation of the Department of Justice to the appeal board never attempts to summarize the FBI report. It merely refers to the FBI report without specifying what part of the report the Department of Justice relies upon. The fact that the appeal board follows the Department of Justice recommendation and denies the conscientious objector status requires the court to speculate as to just what the appeal board did rely upon. Speculation may not be indulged in by the court in a criminal case.—*United States* v. *Alvies,* 112 F. Supp. 618, at page 624; *Estep* v. *United States,* 327 U. S. 114, at pages 121-122.

It is presumed that the appeal board relied on the report and recommendation of the Department of Justice. Since the Department of Justice relies on the entire FBI report, it is necessary to conclude, therefore, that the appeal board is forced to rely on the entire report without seeing it since it adopts the report and recommendation of the Department of Justice.

It is respectfully submitted that the failure on the part of the hearing officer to give a full and fair résumé and summary of the adverse evidence appearing in the FBI report denied appellant due process of law. The denial of the full and fair hearing destroyed the validity of the draft board proceedings. The motion for judgment of acquittal should have been granted. The overruling of the motion and the conviction of the court below constitutes reversible error.

POINT FOUR

The nature of the defenses shows that the appellant was denied procedural due process and that the draft board exceeded its jurisdiction. This makes inapplicable the rule of *Falbo* v. *United States,* 320 U. S. 549, cutting off defenses of illegal classification because of failure to exhaust remedies.

Lack of or excess of jurisdiction could always be shown at the trial for violation of the Selective Service law, even when the courts did not allow any defense during World War II. It was not until 1946, when *Estep* v. *United States,* 327 U. S. 114, allowed classification defenses in a Selective Service proceeding. However, the courts had recognized jurisdictional defenses, even before this decision. Even the decision in *Falbo* v. *United States,* 320 U. S. 549, which did not allow a defense to a registrant who did not appear for induction, did not affect the right to show an induction order void because there was no jurisdiction or that a board had exceeded its jurisdiction.

Since the Government can be made to show that it gave appellant a fair résumé of adverse evidence, how can the Government in advance of trial say that it cannot be made to produce the report? The trial court must examine the FBI report to make its determination as to the fair résumé. The court puts the burden on the Government of proving that it did give a fair résumé. The hearing without such a résumé is devoid of due process of law, and such a matter can always be shown regardless of the question of whether a defendant is permitted to defend. When the hearing officer refused to give appellant a fair résumé of adverse evidence in the FBI report, she exceeded the jurisdiction of the administrative agency. She thereby rendered the entire selective process void. The order of induction was void and did not have to be obeyed. This is what the Court said in *Baxley* v. *United States,* 134 F. 2d 610 (4th Cir. 1943) :

> "This is an appeal from a conviction and sentence on an indictment charging a violation of

> the Selective Training and Service Act of 1940 . . . by the failure of appellant to report . . . for the purpose of being inducted into a work camp. . . . [p. 998]
>
> " . . . if the order of the Board is found to lack foundation in law, or to be unsupported by substantial evidence, or to be so arbitrary and unreasonable as to amount to a denial of due process, the court should treat it as a nullity in the same way as if the question arose in a habeas corpus proceeding."

See also on this point the case of *Wells* v. *United States,* 158 F. 2d 932 (5th Cir. 1947):

> "A jury being waived, the appellant was tried and convicted by the Court below for failure to report to his local board for induction into the armed forces of the United States, in violation of 50 USCA App. sec. 311. [p. 933]
>
> "On the trial below, the appellant was not prevented from proving by any evidence available to him that the induction order was invalid. He was accorded every right to which he was entitled under the doctrine of *Estep* v. *United States, supra.* The distinction between the Falbo and Estep cases is this: Falbo failed to report for the last step in the administrative process and, therefore, was denied the right to prove in a criminal trial that the induction order was invalid. Estep appeared at the induction center but refused to submit to induction; thus having pursued his administrative remedy to the end, he was permitted to defend upon the ground that his classification was illegal and his induction unauthorized. Each of the above cases is in point here, but Falbo has such a narrow application that we prefer to put our decision upon the latter case, which held that, where the in-

> duction order was so contrary to law as to exceed the board's jurisdiction, its action might be interposed as a defense in a criminal prosecution. . . ."

It appears clear from the above discussion and cases, that the appellant can show lack of jurisdiction, even despite his failure to appear for induction. He can show that the order had no validity, and that it had no power to compel his report for induction. The *Falbo* case (320 U. S. 549) is limited to defenses and not to jurisdictional matters. This line of reasoning applies to other jurisdictional excesses, besides failure to give appellant a fair résumé of adverse evidence.—See *United States* v. *Everngam,* 102 F. Supp. 128 (W. Va. 1951).

This contention is clearly born out by the case of *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88. If the hearing is unfair, it is void. In the *Interstate Commerce* case, *supra,* the Court said (at page 91):

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless . . .
>
> "In the comparatively few cases in which such questions have arisen it has distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair, . . . "

A registrant deprived of a fair hearing can raise the question of jurisdiction at all times, regardless of his having failed to report for induction. See *United States* v. *Laier,* 52 F. Supp. 392 (N. D. Cal. S. D.), at page 395:

> " . . . In the present case, however, the objection

> is not made primarily to the facts as found by the local board but to the fact that defendant was denied his lawful right to appear in person and be heard. This error, it would seem, could be cured only by granting such hearing."

United States v. *Laier, supra,* was decided November 8, 1943, when the courts unanimously held that a defense could not be interposed in a criminal action under any circumstances. But this case allowed a defense based upon jurisdiction. This holding was followed in *United States* v. *Peterson,* 53 F. Supp 760 (N. D. Cal. S. D.). See also *Heflin* v. *Sanford,* 142 F. 2d 798-799; *Tung* v. *United States,* 142 F. 2d 919, 921-922; *United States* v. *Ryals,* 56 F. Supp. 773, 775; *United States* v. *Walden,* 56 F. Supp. 777-778.

The rule stated in *Falbo* v. *United States,* 320 U. S. 549, has been superseded by a change in the draft law.

When *Falbo* v. *United States, supra,* arose, Falbo could not receive a final type physical examination until he appeared at the induction center for induction. It was this that impelled the Court in the *Falbo* case to announce the rule that the physical examination was the final step in the administrative process, because the registrant could be rejected at the induction station. The law was later amended on December 5, 1943, providing for the first time for a preinduction physical examination. The purpose of the preinduction physical examination was to save a registrant embarrassment, if he gave up a job or sold a business, only to find himself rejected at the time of induction. The preinduction examination was to give a registrant a chance to know what he could expect, as to induction.

There is a small but enlightening part of the discussion in the Senate, preceding the enactment of said, amendment, as it appears in 89 Cong. Rec. 8079, 8129-8133:

> Mr. Bushfield (South Dakota):
>
> " . . . By way of explanation, let me say that most of the men whose classifications the Senate

has been discussing have established homes, businesses, or professions. The record of the Selective Service indicates that forty and a fraction per cent of all men called in the United States during the month of August (1943) were deferred because of physical defects. In fairness to the group of men who are about to be called, if the proposed legislation is not passed, we should afford them every possible opportunity to ascertain in advance whether they will be accepted; because it will be found that 4 out of every 10 men in the class which is to be called will be returned to their homes as unacceptable. In most cases those men will either have sold their businesses, closed their offices, or lost their jobs; and it is not fair to call them and later return them to their homes, if there is an opportunity to ascertain in advance whether they are acceptable. . . .

" . . . Evidently the examination is of little value, because the induction center records show that a fraction over 40 per cent of all persons examined at the induction centers are returned to their home as unfit.

I say to the Senate that, inasmuch as we have adopted the policy, it is unfair to the heads of families to force them to close their offices or give up their jobs before they are ordered to the induction centers. We should do everything possible to avoid the situation of having a man give up his job, but subsequently, because he does not pass the physical examination at the induction center, return to his home and have to look for a new job or have to open up another business."

Later in the Senate discussion Senator Barkley remarked:

"Mr. President, . . . I think that at the end of

the amendment the words 'shall be binding upon such board in the same manner as now followed upon examination after induction' should be changed to read: 'Shall be binding upon such board in the same manner as now followed upon examination immediately prior to final induction.' The words 'immediately prior to final induction' would be substituted for the word 'after,' which appears in line 10 after the word 'examination.'

"Mr. Bushfield: I accept the suggestion . . . and ask that the modification in the amendment be made. . . .

"Mr. Pepper: Mr. President, I should like to ask the Senator if he has in mind that the examination should be final for all time?

"Mr. Bushfield: No; no more than at present.

"Mr. Pepper: It is for the particular call?

"Mr. Bushfield: Yes.

"Mr. Pepper: So, if he were to be called again the previous examination would not be a finality?

"Mr. Bushfield: No, and the Selective Service and the draft boards can send a man back as many times as they want to."

After said amendment to the draft law, 50 U. S. C. App. §§ 303, 304(a), 57 Stat. 596, 599, the cases of *Gibson* v. *United States,* 329 U. S. 338, and *Dodez* v. *United States,* 329 U. S. 338, reached the Supreme Court. Dodez had failed to report to a Civilian Public Service camp for work as a conscientious objector, in violation of an induction order. He was convicted for not reporting for induction, not being permitted to interpose a defense under the doctrine of *Falbo* v. *United States,* 320 U. S. 549. When the case reached the Supreme Court it held that since the decision of the *Falbo* case, *supra,* a vital amendment had been incorporated into the draft act. The court held that the provision for the preinduction physical examination did not exist

when Falbo was given notice of induction. It held that this made an essential distinction between the *Falbo* case and the *Gibson* case. It held that when Dodez passed the preinduction physical examination, he had exhausted his administrative remedies. The Court said:

> "Dodez refused to go to camp. . . . " [p. 342]
>
> "However, intermediate the Falbo decision and issuance of the order to Dodez to report, the regulations governing the procedure relating to selection for service were changed and in a manner which Dodez says relieved him from the necessity of going to camp in order to complete the administrative process. The Government now concedes we think properly, that Dodez is right in this view." [p. 344]
>
> "The changed regulations, following out the command of sec. 5 of Public Act 197, provide for a preinduction physical examination to be given before issuance of the order to report for induction, rather than afterward. Sec. 629.1 of Amendment No. 200 (9 Fr 440-42), effective Jan. 10, 1944. *This was the basic amendment.* It applied to all registrants subject to call for service, including those classified 4-E . . . " [p. 347] [Emphasis supplied].
>
> "Although the amended regulations thus speak of 'completing the Order to Report' and of placing on his papers 'a statement that a registrant is accepted,' we agree that these were only formal matters to be performed by camp officials, and left nothing to be done by them or by the applicant after reaching the camp that might result in his being rejected or released from the duty to remain and perform the further duties imposed on him. To construe the regulations otherwise would be to force the registrant not only to perform all requirements affording possibility of relief but

> also to go through with purely formal steps to be taken by camp officials offering no such possibility. Exacting this would stretch the requirement of exhausting the administrative process beyond any reason supporting it. Cf. *Levers* v. *Anderson,* 326 U. S. 219." [p. 349]
>
> "We hold, therefore, in accordance with Dodez' view and the Government's concession, that he was not required to report to camp, under the regulations effective when his order to report became operative, in order to complete the administrative process; and that he therefore was not foreclosed by the Falbo decision from making any defense open to him in his criminal trial under the Statute or the Constitution aside from the effect of the decision. *Estep* v. *United States,* 327 U. S.; *Smith* v. *United States,* ibid; Cf *Billings* v. *Truesdell,* 321 U. S. 542." [p. 350]

This case shows that *Falbo* v. *United States,* 320 U. S. 549, applies only to the circumstances existing under the law in effect at the time of the decision in that case. Under the law in effect, when Dodez did not report for induction in a camp, the administrative remedies, like here, were exhausted after the taking of the preinduction physical examination. It is thus made clear that the law stated in *Falbo* v. *United States, supra,* is not always the yardstick for determining the matter of exhaustion of remedies.

The *Gibson* and *Dodez* cases, *supra,* came up for discussion in the Second Circuit in 1946, in the case of *United States* v. *Balogh,* 160 F. 2d 999. In the *Balogh* case, the defendant had not reported for induction. The Court of Appeals said that it would have followed the law laid down in the *Gibson* and *Dodez* cases if it were not for the wording of the statute as amended in 1946. The Court said that the statute provided for re-examinations and periodic re-examinations and that therefore the preinduction physical was not final, if it had been taken more than 90 days before

the induction order. This 90-day period had been fixed by Army Regulation 615-500(e). The court held further that the army regulation did not violate the law, because the law had provided for periodic re-examination. It will be shown later that the law has no provision now for a periodic re-examination.—See *United States* v. *Balogh,* 160 F. 2d 999 (2d Cir.):

> "Were it not for a circumstance, which we shall mention presently, we should therefore conform to the Supreme Court's order, as we understand it, by merely saying that, for the reasons that we gave in *United States* ex rel. *Kulick* v. *Kennedy, supra,* we held that Balogh had 'exhausted his administrative remedies' before the order of induction was served upon him, and that therefore, by virtue of *Estep* v. *United States,* he was privileged upon his trial to challenge the regularity of the proceedings of the authorities which drafted him. Indeed, as we read *Gibson* v. *United States,* we should have been right in so ruling, had Balogh been physically examined within 90 days before the induction order was served upon him; and it is because he had not been so examined that the appeal takes on a different face. When the case was before us originally we had not discovered the Army Regulation, passed on August 10, 1944 (615-500(e)), the important part of which we quote in the margin; nor did either side call it to our attention. This declared that 90 days after a registrant has been examined his examination becomes void, and that he must be re-examined before induction. On December 12, 1945, Balogh's only physical examination, which had been on April 21st, had therefore ceased to be valid, and he should have been subjected to a new and 'complete examination,' which might have resulted in his exemption or reclassification. Therefore, un-

> less the regulation was itself invalid, he had not 'exhausted his administrative remedies' within *Falbo* v. *United States, supra,* and was not within *Estep* v. *United States, supra.*
>
> "Balogh asserts that he regulation was invalid because it ran counter to the amendment of the Selective Service Act, passed December 5, 1943. . . . Whatever might be the necessary implications from the amendment, if it had been in other words, the language chosen leaves no doubt that it did not have the effect which Balogh desires; for it explicitly declared that the putative physical examination shall be 'subject to re-examinations', and indeed, even more significantly, to 'periodic re-examinations.' These words were an invitation to promulgate just the kind of regulations that the Army did promulgate; it put all registrants on guard that they became 'subject to' a new examination every three months; and it was valid, so far as concerned the amendment."

The *Balogh* case, 160 F. 2d 999 (2d Cir.), is authority for two propositions. It means: (1) that *Falbo* v. *United States,* 320 U. S. 549, does not always make failure to report for induction cause for cutting off defenses in a criminal proceeding; (2) that the law, as amended, allowed for periodic examinations and re-examinations, and thus the Army regulation was valid, but that an army regulation in contravention of law that has no provision for periodic re-examination is not valid to stay a preinduction physical examination from being a completion of the administrative process. The statute that the Court referred to in *United States* v. *Balogh,* 160 F. 2d 999, *supra,* is contained in 57 Stat. at Large 599, sec. 5.

That law went out of existence and in 1948 a new draft law was enacted. This law also provided for preinduction physical examinations. The present law does not provide for periodic examinations or re-examination. See 50 U. S. C.

App. § 454(a). While it is true that the army has a regulation requiring a re-examination before induction, if the preinduction physical examination is more than 120 days old this regulation contravenes the intention of the present law, to make the preinduction physical examination the final step in the administrative process. Under *United States* v. *Balogh,* 160 F. 2d 999 (2d Cir.), *supra,* the present army regulation is *ultra vires,* in this respect.

Appellant has passed his preinduction physical examination and been given a certificate of acceptability. He did everything that was required of him in the administrative process. Any other step was one exacted by the army for its own protection and did not affect the completion of the administrative process.

Since appellant was found acceptable, he was subject to induction as far as completion of the administrative process goes. The army might reject him, but that is for the army and not a matter for completion of the administrative process.

The Government might argue that, if such were the intention, the regulation would have provided for induction of all men forwarded for induction without the clause "and found acceptable will be inducted into the armed forces." They might say this shows that a physical examination was contemplated at the induction station prior to induction. But this does not mean that at all. The requirement for acceptance was inserted to allow for examination and acceptance of delinquents and volunteers, who, under the regulations, may be ordered to report for induction prior to the taking of a preinduction physical examination. See 32 C. F. R. §1630.5; 32 C. F. R. §1628.10; 32 C. F. R. §1631.7(a); 32 C. F. R. §1632.16. Appellant has already been found acceptable, while the volunteer or delinquent has not, and he must undergo a physical examination to comply with the regulation requirement for induction, that is, he must be found acceptable.

While the induction order does state that the inductee

might be rejected at the induction station for physical reasons, this does not affect the matter of exhaustion of remedies. The regulations of Selective Service do not provide for such a form of notice, and, in fact, such a provision of the notice violates the draft act, because it has the effect of ordering men for induction without an acceptance after a preinduction physical examination. The local board had no right to issue the order for induction with the said comment, because it violated 32 C. F. R. § 1628.10, which reads:

> "Every registrant, before he is ordered to report for induction, or ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest, shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination."

The local board was under a duty to order a new preinduction physical examination, when it knew his induction was imminent, if his preinduction physical was too old, whether under local board or army rule the first preinduction physical was too old. The induction order was void because it was premature.

The Government may argue that the court overruled this contention in *United States* v. *Balogh,* 160 F. 2d 999 (2d Cir.) *supra.* While the court did say that such practice was an irregularity only, it was deciding the case under the law, as it then existed, providing for re-examination and periodic re-examination. There is no provision in the present law providing for re-examination or periodic examination. The provision for re-examination validated the army regulation, and made the early induction order a mere irregularity, in *United States* v. *Balogh, supra.* The induction order would be void otherwise, because a prein-

duction physical examination must now precede an induction order.

An interpretation that requires two physical examinations to be had for the purpose of exhausting administrative remedies is stretching the intent of Congress beyond any good reason. An appellant should not be deprived of important defenses in a prosecution involving a felony, jail sentence, and loss of civil rights on strict procedural interpretations.

The law and regulations, on this point, should be construed in favor of a registrant-appellant. This contention is upheld by Judge McGrannery in Ex parte *Fabiani,* 105 F. Supp. 139 (E. D. Pa.):

> "*Gibson* v. *U. S.,* 329 U. S. 338, presents an interesting variation of the Estep theme, and shows that the Supreme Court is tending to broaden the remedies of the Selective Service registrant. . . ." [p. 145]
>
> "In addition to a desire to avoid the marching up the hill and down again condemned by the Supreme Court in *Estep* v. *U. S.,* 327 U. S. 114, 125, another strong consideration moves this Court to intervene to protect the rights of petitioner, even though he has not reported for a preinduction physical examination or for induction. The consideration is the difference in purpose between the 1940 Act on the one hand and the 1948 and 1951 Acts on the other. The first was enacted when Europe was already at war; when Belgium, Holland, Norway, Denmark, and France had already been overrun by Nazi Germany, and Great Britain seemed about to be devoured in its maw. During by far the greater part of the operation of the Act, the United States itself was at war, locked in deadly embrace with predatory and militaristic powers. Draft quotas ran to 300,000 and

400,000 men a *month.* The keynote was urgency, speed, and a sense of immediate peril. This is sharply revealed in the opinion of Mr. Justice Black for the Supreme Court in *Falbo* v. *U. S.,* 1944, 320 U. S. 549, 551:

" 'When the Selective Service and Training Act was passed in September 1940, *most of the world was at war.* The preamble of the Act declared it *"imperative to increase* and train the personnel of the armed forces of the United States." The *danger of attack* by our present enemies, if not imminent *was real,* as subsequent events have grimly demonstrated. *The Congress was faced with urgent necessity of integrating all the nation's people* and forces for national defense. That *dire consequences* might flow *from apathy and delay* was well understood. Accordingly the act *was passed to mobilize national manpower* with the *speed* which the necessity and understanding required.' (Italics ours.)"

"The purpose of the 1948 and 1951 Acts, to the contrary, is merely to achieve and maintain sufficient armed strength to deter aggression; it is not to prepare for war . . . Thus, in contrast to the 'imperative' terminology in the preamble to the Act of 1940, we find in the introduction to the Act of 1948:

" 'The Congress hereby declares that an *adequate* armed strength must be *achieved and maintained* to insure the security of this nation.' 62 Stat. 605. (Emphasis added)." [p. 145]

"The preamble to the Act of 1951 contains identical language. [50 USCA App. 451] . . . "

"The different objective to be achieved by the new Act behooves us to employ a more liberal standard of judicial review, so as better to protect the rights of the individual. Should—what

> God forbid—world tensions increase greatly or should general war come, then the judicial arm can once again cut to the barest minimum its supervision of the operations of the draft." [page 146]
>
> "We think that the different objective of the 1948 and 1951 Acts has been recognized by numerous Courts, and that they are consequently more willing to scrutinize the actions of the local boards. (Cf. Horowitz, 'Rights of a Registrant under the Selective Service Law,' 7 Intramural Law Review of N. Y. U. 106 (Jan. 1952).) Thus in *Tomlinson* v. *Hershey,* (E D Pa. 1949), (95 Fed. Supp. 72), Judge Ganoy of this Court refused to dismiss a complaint for an injunction and a declaratory judgment brought by a registrant against the authorities of Selective Service, even though he had not reported for induction as ordered. . . ." [page 147]

In view of the liberal interpretation of the new draft act, so eloquently expressed by Judge McGrannery, this Court should not construe that act that has dropped the requirement for periodic re-examination, to compel a registrant to exhaust his remedies both during the administrative process and then again at the induction station, just before induction. Liberal construction should not be used to deprive an appellant of valuable defenses. The *Fabiani* case was mentioned with approval in *United States* v. *Graham,* 108 F. Supp. 794. This case was decided by Judge Brennan in the Northern District of New York. The court said at page 797:

> "In the present case of Ex parte *Fabiani,* D. C. 105 F. Supp. 139, there is discussed the increasing willingness of Courts to scrutinize the action of local boards, and the cases cited above, together with *U. S.* v. *Strebel,* D. C., 103 F. Supp. 628, are

indicative of the fact that the regulations must be strictly construed in favor of the registrant."

It is respectfully submitted, therefore, that the trial court had the right to pass upon the defenses made to the indictment and that the rule of *Falbo* v. *United States,* 320 U. S. 549, does not apply here to stop consideration of any of the points raised in this case.

CONCLUSION

Wherefore appellant prays that the judgment of the court below be reversed and the cause be remanded with directions to enter a judgment of acquittal and discharge the appellant.

Respectfully,

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December, 1953.